



24 CFR Part 11

[Docket No. FR-6192-F-02]

RIN 2501-AD93

Implementing Executive Order 13992, Revocation of Certain Executive Orders Concerning Federal Regulation

AGENCY: Office of General Counsel, HUD.

ACTION: Final rule.

SUMMARY: On November 10, 2020, the U.S. Department of Housing and Urban Development (HUD, or the Department) published an interim final rule that implemented Executive Order 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents.” This order required Federal agencies to publish regulations to codify processes and procedures for issuing guidance documents. HUD created new regulations that outlined HUD policy and procedures for issuing guidance documents. On January 20, 2021, President Biden issued Executive Order 13992, “Revocation of Certain Executive Orders Concerning Federal Regulation” which, among other things, revoked Executive Order 13891. After considering the public comments HUD received in response to its interim final rule and given the revocation of Executive Order 13891, this final rule removes the regulations HUD created in January.

DATES: Effective **[Insert date 30 days from date of publication in the Federal Register]**.

FOR FURTHER INFORMATION CONTACT: Aaron Santa Anna, Associate General Counsel, Office of Legislation and Regulations, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 10282, Washington, DC 20410-5000; telephone (202) 402-5300 (this is not a toll-free telephone number). Persons with hearing or speech impairments may access this number via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

A. Executive Order 13891 on Promoting the Rule of Law Through Improved Agency Guidance Documents

On October 9, 2019 (84 FR 55235), the President issued Executive Order (E.O.) 13891, “Promoting the Rule of Law Through Improved Agency Guidance Documents.” E.O. 13891 recognized that the Administrative Procedure Act (5 U.S.C. 551-559) (APA) exempts “interpretive rules, general statements of policy, or rules of agency organization, procedure or practice,” except when required by statute, from the notice and comment requirements for rulemaking. (5 U.S.C. 553(b)). E.O. 13891 stated, however, that, in the view of the last administration, agencies have sometimes used this authority to issue guidance documents that regulate the public without following the notice and comment rulemaking procedures of the APA. As a result, E.O. 13891 required Federal agencies to issue regulations to codify processes and procedures for issuing guidance documents. Among other things, E.O. 13891 required that agency regulations establish procedures for modifying, withdrawing, and using guidance documents, including requiring notice and comment for significant guidance documents, and taking and responding to petitions from the public for withdrawal or modification of a particular guidance document.

B. HUD’s Interim Final Rule

In response to E.O. 13891, HUD published an interim final rule on November 10, 2020 (85 FR 71537) that established a new part 11 in title 24 of the CFR. The new part 11 required HUD to follow certain procedures in issuing guidance documents. These procedures included: establishing a single agency website where the public can find all HUD guidance in effect; OMB review of significant guidance; public comment on significant guidance; and a procedure for the public to request withdrawal or modification of a guidance document. In issuing its interim final rule, HUD determined that good cause existed to omit advanced public comment because the

rule was limited to internal HUD procedures and did not impose new requirements on members of the public. The rule took effect on December 10, 2020.

Although HUD determined that good cause existed to publish its interim final rule prior to soliciting public comment, HUD provided for a 60-day public comment period. In response to its interim final rule, HUD received seven public comments which were mostly critical of, or recommended significant changes to, the interim final rule. A summary of these comments and HUD's responses to them are provided in Section III of this document.

C. Executive Order on Revocation of Certain Executive Orders Concerning Federal Regulation of January 20, 2021

On January 20, 2021, President Biden issued E.O. 13992, "Executive Order on Revocation of Certain Executive Orders Concerning Federal Regulation," which among other things, revoked E.O. 13891. E.O. 13992 also directed agencies to promptly take steps to rescind any orders, rules, regulations, guidelines, or policies, or portions thereof that implemented or enforced the Executive Orders revoked. E.O. 13992 states, "It is the policy of [the] Administration to use available tools to confront the urgent challenges facing the Nation, including the coronavirus disease 2019 (COVID-19) pandemic, economic recovery, racial justice, and climate change. To tackle these challenges effectively, executive departments and agencies (agencies) must be equipped with the flexibility to use robust regulatory action to address national priorities. This order revokes harmful policies and directives that threaten to frustrate the Federal Government's ability to confront these problems and empowers agencies to use appropriate regulatory tools to achieve these goals."

II. This Final Rule

Given the revocation of E.O. 13891, and after considering the public comments HUD received in response to the interim final rule, HUD has decided to remove 24 CFR part 11. In reaching this conclusion, HUD concluded that the interim final rule deprives HUD of necessary flexibility to determine when and how to best issue guidance documents based on particular facts

and circumstances, and unduly restricts HUD's ability to provide timely guidance on which the public can confidently rely. Notwithstanding this determination, HUD takes the opportunity in this rule to respond to public comments received in response to its interim final rule.

III. The Public Comments

The comment period for HUD's interim final rule closed on January 11, 2021. HUD received seven public comments from various housing policy and legal interest groups, a law firm, and two public housing agencies (PHAs). HUD appreciates the time that commenters took to review its interim final rule and provide helpful information and valuable comments and recommendations.

The Comments Generally

Most commenters opposed the interim final rule and urged HUD to withdraw or rescind the rule and "abandon" codification of 24 CFR part 11. Most commenters stated that HUD should encourage the facilitation and dissemination of guidance, particularly given the urgent need for federal response to current crises, such as the COVID-19 pandemic and lack of affordable housing, and housing discrimination. These commenters stated that the rule would make it more difficult for HUD to quickly respond to these crises and fulfill its mission of creating strong, sustainable, inclusive communities.

A majority of the commenters also thought that the rule would create confusion among HUD stakeholders and the public. Commenters stated that the interim final rule "would have a negative impact on the successful administration of HUD's programs," and would "significantly delay each program office's ability to be responsive to emergencies and emerging questions and issues and increase the workload for HUD." Commenters also warned that the burdens and delays imposed by the interim final rule would negatively impact the ability of stakeholders such as PHAs, tenants, and advocacy groups to carry out their respective missions and may subject their programs to litigation.

Two commenters generally supported the interim final rule but offered recommendations for significant changes, such as expanding it to provide the public an opportunity to request the issuance of new guidance or the reinstatement of rescinded guidance. One commenter recommended that HUD include an explicit judicial review provision to make it clear when review of a document becomes final to permit an interested party to seek redress from the courts. *Comment: The Interim final rule's procedural requirements will delay the issuance of guidance and limit HUD's flexibility in issuing guidance.*

Commenters expressed concern with the review of HUD guidance by the Office of Information and Regulatory Affairs (OIRA) and the need for HUD to receive and review public comments on significant guidance. One commenter stated that OIRA is a small office with a heavy workload that is slow to formally review proposed and final rules submitted by HUD. The commenter stated that adding the review of many HUD guidance documents to OIRA's workload would cause significant delays in the issuance of both HUD's guidance documents and its rules issued under the Administrative Procedure Act. Another commenter stated that "applying such procedures to sub-regulatory guidance creates unnecessary and burdensome bureaucracy." Other commenters said that the review, approval, and signature process for significant guidance "would hamper [HUD's] ability to act nimbly to issue guidance on key issues." Finally, one commenter noted that the rule would not only delay, but ultimately prevent, the dissemination of guidance.

Commenters also stated that allowing petitions to modify or rescind guidance documents and the requirement for HUD to respond to each petition in writing, would drain scarce agency resources and hamper HUD's ability to issue important guidance. One commenter stated that the process of permitting HUD to issue a coordinated response to similar petitions is insufficient to address delay issues. The commenter further said that HUD would be "doing the work" for petitioners with inadequate submissions "by laying out a roadmap and effectively crafting arguments for petitioners to have their petitions successfully adjudicated." Another commenter

added that the “petition mechanism will likely confuse funding recipients,” which in turn would create more work for HUD staff and delay day-to-day programmatic decision-making. The commenter also noted that “the interim final rule will strip authority from the career experts who normally develop guidance ... and place day-to-day decisions directly into the hands of non-experts”.

HUD Response:

HUD agrees that the timely dissemination of guidance documents is important to the successful administration and consistent implementation of its programs. In support of this policy, HUD must have flexibility to quickly issue guidance to further the implementation of HUD’s programs without additional barriers. As commenters noted, applying the notice and comment process to significant guidance documents would unnecessarily detract from HUD’s ability to respond to the needs of its stakeholders and adversely impact its ability to issue regulations under the APA by diverting HUD and OMB resources away from rulemaking processes. In addition, HUD currently seeks input from the public on many of its guidance documents and often issues guidance documents in response to such input and frequently asked questions. Similarly, HUD agrees that the petition process would cause delay in HUD’s ability to disseminate guidance documents. Furthermore, HUD agrees that there is no need to codify such a requirement because HUD can and does already receive requests from the public which it considers when issuing, updating, and rescinding guidance.

Comment: The ambiguity of the terms used in the interim final rule make the scope of the rule unclear.

Commenters stated that the interim final rule lacks clarity, uses ambiguous terms, and creates general implementation issues. Many commenters stated that the interim final rule does not provide clear definitions and does not clarify which types of communication are subject to the rule. For example, commenters noted that the interim final rule’s definition of what constitutes “guidance” is vague and makes the scope of the rule unclear. One commenter noted

that the definition of “guidance” could be read broadly enough to include “virtually all written communications HUD delivers to stakeholders.”

One commenter found the definition of guidance lacking and recommended that legal opinions directed to parties about circumstance-specific questions and Notices of Funding Availability (NOFAs)¹ be added to the definition of guidance documents. The commenter suggested that legal opinions are helpful to more than a single PHA facing similar factual scenarios.

Commenters also stated that the definition of “significant guidance” is unclear, overly broad, and susceptible to variance. One commenter stated that terms used in the definition of “significant guidance,” such as “serious inconsistency” or “interference” with another agency, are so vague that “if [the interim final rule is] interpreted broadly, nearly every piece of guidance not explicitly exempted from being considered significant guidance will be subject to the burdensome OIRA review and public comment process.” The commenter also noted the lack of explanation for how economic impact analyses would be conducted for significant guidance, and the apparent lack of public access to such analyses.

HUD Response:

HUD agrees that the terms and definitions used by the interim final rule lack clarity and could lead to confusion and inconsistent implementation of HUD’s programs. HUD appreciates the commenters’ recommendations regarding legal opinions, but each legal opinion is party- and fact-specific, and HUD does not believe that they can be made generally applicable to other similarly situated parties. As for the NOFA process, PHAs and other entities are permitted to follow-up with HUD with questions regarding NOFAs and provide feedback for future NOFAs regardless of the language in part 11.

¹ HUD currently uses the term Notices of Funding Opportunity or “NOFO” for documents that would previously have been referred to as NOFAs. This change is based on the terminology used in Office of Management and Budget Management in its Guidance for Grants and Agreements (85 FR 49506, August 13, 2020). However, following the terminology used in the public comments, this document uses the term “NOFA” throughout.

Lastly, HUD agrees with public commenters that the definitions of “guidance” and “significant guidance” could be interpreted broadly and doing so would make issuing guidance challenging. HUD notes that the definition of “significant guidance” incorporated in the interim final rule mirrors the definition in E.O. 12866 (Regulatory Planning and Review) for “significant regulatory action” and includes “novel legal or policy issues” which challenges articulating a specific definition. Notwithstanding, the requirement that HUD provide an economic analysis for guidance that rises to the level of “significant regulatory action” creates additional challenges to the Department’s ability to timely issue guidance and outweighs any benefit resulting from the interim final rule.

Comment: The interim final rule creates uncertainty.

Commenters stated that the uncertainty created by the interim final rule would negatively affect HUD constituencies that routinely rely on HUD guidance, including tenants, advocates, owners, vulnerable populations, and PHAs. One commenter stated that HUD guidance is undermined by the provision noting that “the authority is nonbinding and unenforceable.” The commenter stated that the interim final rule would ultimately lead to inconsistent interpretations of HUD guidance because the provision negates the purpose of issued guidance “by inviting PHAs and owners to ignore it.” Another commenter stated that if a guidance document, which PHAs have routinely incorporated into their policies for decades, is determined to have no legal effect or rescinded, PHAs will find themselves “in limbo” with no new replacement guidance.

One commenter stated that the interim final rule may adversely impact vulnerable populations and encourage discriminatory policies. For example, survivors of domestic violence, sexual assault, and stalking would be left without access to certain remedies and procedures established under guidance (but not mentioned in statutes or regulations). According to the commenter, ignoring guidance on emergency transfers leaves “survivors without a clear path to obtaining an emergency transfer, leaving them in unsafe situations for longer periods of time.” The commenter also stated, by way of example, that “people with disabilities rely on HUD

guidance to determine where they can live with their assistance or emotional support animals” and provide people with disabilities a “greater security when confronting housing discrimination.” A commenter further asserted that “by suggesting that PHAs or owners ignore HUD guidance, HUD encourages discriminatory policies against tenants with disabilities who need accommodations.”

Several commenters stated that the process for public petition would reduce reliance on guidance documents because it permits repeated requests for rescission of certain documents, and “create[s] a constant and ongoing state of uncertainty about whether the guidance will continue in effect or be withdrawn or modified pursuant to a petition from the public.” Other commenters stated that it is not clear how the review of a petition would operate or what remedies would be available if the public disagrees with a determination made by HUD in response to a petition.

One commenter focused on several other aspects of the interim final rule that the commenter said are unclear, including the “description of the public participation requirement;” whether any exceptions to OIRA review under § 11.8 apply; how these exceptions interact with § 11.3(b); and the implications of the interim final rule on joint agency guidance. For the public participation requirement, the commenter referred to § 11.6(b), and stated that stakeholders cannot discern “when HUD is soliciting public input on potential significant guidance.” Another commenter stated that the applicability of the good cause exception is unclear.

One commenter stated that under the interim final rule, it is unclear how HUD would notify the public when significant guidance documents are available for comment, for example, whether HUD would publish the significant guidance documents in the Federal Register or post an open letter on its website. The commenter requested that HUD explain how it would choose between outreach methods.

Commenters also stated that the interim final rule lacked clarity as to whether it applies to guidance retroactively and sought clarification on whether existing guidance documents remain in effect. One commenter recommended that the scope of the interim final rule be limited to

future guidance and allow current guidance to remain in place until the issuance of newly issued guidance documents.

HUD Response:

HUD agrees that the processes outlined in the interim final rule lack clarity and would likely lead to the inconsistent application of HUD's programs. HUD also agrees that the use of guidance is helpful to supplement regulatory and statutory requirements and that HUD does not want to suggest, as a commenter stated, that guidance documents can be ignored. HUD agrees that HUD guidance documents that aim to prohibit and prevent discrimination against persons with disabilities and other protected classes should be reasonably relied on by stakeholders.

As for the ambiguity pointed out by commenters on procedures and processes for public petitions, identification of significant guidance for public comment, and retroactivity of the rule, HUD agrees that the rule provided minimal guidance to the public on how HUD would address those provisions and believes this further supports the determination to remove 24 CFR part 11.

Comment: The new indexed website portal is misguided.

One commenter supported HUD's use of the indexed guidance portal, but many had questions about it. A commenter questioned whether HUD has the operational capacity to establish and maintain a "single, searchable, indexed website" as required by the interim final rule. The commenter stated that although the interim final rule went into effect on December 10, 2020, "it appears no such guidance website has been established." The commenter also asked what HUD intends to do with the guidance documents not posted on this new guidance website, or what will happen with guidance documents that are removed from the website.

Other commenters questioned whether the guidance portal will achieve the goal of making program policies more transparent. One commenter specifically noted that separating guidance documents from other types of documents (such as, NOFAs, legal briefs, and opinions) makes program administration and policies less transparent, especially since it is not clear what a guidance document is under the interim final rule. The commenter also questioned what HUD

meant by describing the guidance portal as “a single, accessible source of information” for HUD programs and policies. The commenter recommended that “it would be better to organize relevant documents of all types by program and subject matter, rather than by document type.”

Another commenter asked whether PHAs or members of the public could challenge HUD’s decision to include or not include a guidance document on its website. The commenter noted that stakeholders “should have a formal opportunity to inform HUD if previously-issued helpful guidance has been omitted from the guidance website.” The commenter also recommended that HUD include on the portal cross-references to other federal agencies’ guidance documents which potentially impact PHAs, such as, the Federal Highway Administration’s guidance on relocation under the Uniform Relocation Assistance and Real Property Acquisition Act.

HUD Response:

HUD will continue to disseminate and provide guidance documents pertaining to specific programs and agrees that continuing to organize documents by program type and subject matter may be helpful to PHAs and others using HUD programs. At the same time, it will continue to pursue ways to make its guidance documents more accessible to the public.

Comment: HUD lacked good cause to bypass the APA’s notice-and-comment procedures.

Several commenters questioned HUD’s authority to publish the interim final rule without first seeking public comment, noting that HUD did not adequately establish good cause to issue the rule. Commenters stated that no emergency or exigency existed to justify application of the good cause exception. These commenters said the fact that HUD issued its interim final rule more than a year after the issuance of E.O. 13891 undercuts HUD’s justification to omit prior public comment. Commenters also stated that “the approach taken by HUD in this rulemaking is wholly inconsistent with the value of public input.” Some commenters stated that if HUD goes on to implement regulations on guidance, HUD should follow normal notice-and-comment procedure beginning with a proposed rule and should better involve stakeholders, such as PHAs.

HUD Response:

HUD's authority to issue the interim final rule without the public notice period relied on both the APA and 24 CFR part 10 authority to issue rules regarding internal procedures prior to receiving public comment. HUD appreciates and understands the commenters' concerns, but HUD maintains that the interim final rule was procedural rather than substantive, because it affected only HUD internal procedures and imposed no obligations on parties outside the federal government. Specifically, the regulation required HUD to issue and maintain guidance documents in a certain manner but did not create any new obligations for parties other than HUD itself. HUD also notes that while it issued the interim final rule for immediate effect, it provided the opportunity for public comment that HUD has considered in issuing this final rule.

Comment: Changes could improve the interim final rule.

Some commenters generally supported the interim final rule but made recommendations for significant changes. One commenter supported the interim final rule's provision that provided the public a procedure to challenge the agency's issuance of guidance but recommended that the interim final rule also provide for "judicial review after the final disposition of a petition for withdrawal or modification of guidance documents." The commenter reasoned that without additional procedure, regulated entities would have difficulty establishing that an agency's determination on a challenged guidance document is a "final agency action" subject to APA review. The commenter recommended revising § 11.6, by adding a paragraph that would provide, "[a]ny agency pronouncement, response, or failure to respond pursuant to this section shall constitute final agency action under 5 U.S.C. 704 and shall be subject to review pursuant to 5 U.S.C. 702."

Other commenters offered revisions to § 11.6, including adding provisions for the public to request clarification of existing guidance, reinstatement of old guidance, or creation of new guidance, and establishing a mechanism for expediting guidance when necessary. Another commenter stated that the rule does not explain how new procedures, namely the petition

process, will be accessible to people with disabilities and emphasized the importance of “ensuring that people with disabilities are afforded equal opportunity to comment during public notice and comment periods.” One commenter recommended extending the comment period for significant guidance to 60 days, instead of the existing 30 days, because significant guidance documents “are likely to be complex in subject matter and scope.”

HUD Response:

HUD disagrees with these recommendations. Providing for “judicial review after the final disposition of a petition for withdrawal or modification of guidance documents” would create additional hurdles for HUD’s issuance of guidance documents. Similarly, providing the public a formal opportunity to request the issuance of new guidance or the reinstatement of rescinded guidance would be extremely time consuming, require the use of limited HUD resources, and impede HUD’s ability to provide timely guidance, particularly in times of crisis. Moreover, HUD believes that stakeholders already can and do question or request the revision of existing guidance, reinstatement of old guidance, or creation of new guidance. HUD believes that engagement with the public in this informal manner effectively addresses the needs of HUD stakeholders without the additional burden of creating a formal process as proposed.

President Biden’s “Executive Order on Revocation of Certain Executive Orders Concerning Federal Regulation,” of January 20, 2021, revoking E.O. 13891 provides HUD the opportunity to remove 24 CFR part 11. Consideration of the comments received from the public provide HUD an additional basis for removing 24 CFR part 11.

IV. Findings and Certifications

Regulatory Review – Executive Orders 12866 and 13563

Under E.O. 12866 (Regulatory Planning and Review), a determination must be made regarding whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. E.O. 13563 (Improving Regulations and Regulatory Review) directs executive agencies to

analyze regulations that are “outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.” E.O. 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.

This rule was determined not to be a “significant regulatory action,” under section 3(f) of E.O. 12866 and therefore was not reviewed by OMB. This rule is also not a major rule under the Congressional Review Act (5 U.S.C. 801 et seq.), as designated by the Office of Information and Regulatory Affairs (OIRA).

Environmental Impact

The rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Accordingly, under 24 CFR 50.19(c)(1), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and on the private sector. This rule does not impose a Federal mandate on any state, local, or tribal government, or on the private sector, within the meaning of UMRA.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.), generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule removes 24 CFR part 11

which would have required that HUD follow certain internal procedures in issuing guidance documents. These procedures included establishing a single agency website where the public can find all HUD guidance in effect; OMB review of significant guidance; public comment on significant guidance; and a procedure for the public to request withdrawal or modification of a guidance document. Removal of these procedures imposes no significant economic impact on a substantial number of small entities. Therefore, the undersigned certifies that this rule will not have a significant impact on a substantial number of small entities.

Executive Order 13132, Federalism

E.O. 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either: (1) imposes substantial direct compliance costs on State and local governments and is not required by statute, or (2) preempts State law, unless the agency meets the consultation and funding requirements of Section 6 of the E.O. This Interim final rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments nor preempt state law within the meaning of the E.O.

List of Subjects

24 CFR Part 11

Administrative practice and procedure.

Accordingly, for the reasons described in the preamble and under the authority of 42 U.S.C. 3535(d), the U.S. Department of Housing and Urban Development removes 24 CFR part 11.

Dated: June 24, 2021.

Marcia L. Fudge, Secretary

[BILLING CODE 4210-67]

[FR Doc. 2021-14019 Filed: 7/2/2021 8:45 am; Publication Date: 7/6/2021]